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Torts -- Negligence -- Last Clear Chance

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of security, because the courts are still prone to look through the form of a transaction to its real substance. The taxpayer would be well advised to consider carefully the above mentioned factors which influence the courts in deciding cases. No one factor is usually conclusive in deciding a case, but certainly the more consideration the stockholder gives to each, the greater the possibility that he will not be caught in a tax trap.

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Torts—Negligence—Last Clear Chance

A recent North Carolina case[1] involving the doctrine of "last clear chance" seems to have been decided contrary to a long line of unbroken precedents. The case was this:

The defendant was driving down an unpaved public road at eight-thirty p.m. The evidence favorable to the plaintiff showed the road at the place in question was straight and virtually level for a distance of two to three hundred feet, and that there were no obstructions to vision. The plaintiff was lying in the road asleep, between and parallel to two ruts which were in the road. The defendant approached the plaintiff with his lights on low beam and did not see him until approximately twenty-five feet away. He first thought the plaintiff's body was a box or the like, and did not recognize it as a human being until five or six feet away. The defendant's car passed over the plaintiff, straddling him with its wheels, but the oil pan on the car struck the plaintiff in passing, inflicting serious injuries. The defendant stopped twenty-five feet beyond the place where the plaintiff was lying.

The defendant's motion for nonsuit at the trial below was granted, and on appeal it was affirmed, the court holding in a four to three decision that the doctrine of last clear chance was inapplicable on the facts.

It is proposed in this Note to look briefly at the background of the doctrine of last clear chance, after which an attempt will be made to deduce from the North Carolina cases the principles underlying the law of last clear chance in North Carolina. Finally, the principal case will be examined in the light of these principles.

The doctrine of last clear chance is well-established in North Carolina, as in most common law jurisdictions.[2] Although it is stated

[1] Barnes v. Horney, 247 N.C. 495, 101 S.E.2d 315 (1957).

[2] Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954); Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); Triplett v. Southern Ry., 205 N.C. 113, 170 S.E. 146 (1933); Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 163 S.E. 122 (1932); Norman v. Charlotte Elec. Ry., 167 N.C. 533, 83 S.E. 835 (1914); Sawyer v. Roanoke R.R. & Lumber Co., 145 N.C. 24, 58 S.E. 598 (1907); Lassiter v. Raleigh & G. R.R., 133 N.C. 244, 45 S.E. 570 (1903); Bogan v. Carolina Cent. R.R., 129 N.C. 154, 39 S.E. 808 (1901); Pickett v. Wilmington & W.

differently in different jurisdictions, it may be said generally that it is that principle which allows recovery to a plaintiff who has been contributorily negligent in bringing about his injury, when the defendant, notwithstanding the plaintiff's negligence and his own prior negligence, could still have averted the plaintiff's injury through the exercise of due care.[3]

The doctrine is generally considered to be an application of proximate cause.[4] The argument is that, although both the plaintiff and the defendant have been guilty of negligence, the plaintiff's negligence has culminated, leaving him in a perilous position, and that the defendant then, by the exercise of due care, could still have avoided the injury. Hence, it is argued that the defendant's subsequent negligence was the proximate cause of the injury, and the plaintiff is not barred from recovering by his prior negligence.

The harshness of the doctrine of contributory negligence is generally credited with bringing about the adoption of the doctrine of last clear chance.[5] This doctrine has also been characterized by a leading authority[6] as a "way-station" in the transition from contributory negligence to comparative negligence. Whatever its past and its future, it must be conceded that its present effect, by making it possible for negligent plaintiffs to recover, is to shift the total burden of the loss from an injury from a plaintiff who formerly was barred by contributory negligence, to the defendant who is now held liable under the doctrine of last clear chance.

North Carolina has a long line of cases discussing and applying the doctrine.[7] For the sake of convenience of discussion and a better understanding of the North Carolina law of last clear chance, they will be divided into four categories. They are:[8]

I. The peril of the plaintiff *is* actually discovered by the defendant; the plaintiff is physically *unable* to prevent his injury through the exercise of due care.

II. The peril of the plaintiff *is* actually discovered by the defendant; the plaintiff is physically *able* to prevent his injury through the exercise of due care.

R.R., 117 N.C. 616, 23 S.E. 264 (1895); Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890); PROSSER, TORTS § 52 (2d ed. 1955); Note, 5 N.C.L. REV. 58 (1927).

[3] 38 AM. JUR., *Negligence* § 215 (1941).

[4] Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890); Annot., 92 A.L.R. 47 (1934).

[5] PROSSER, TORTS § 52 (2d ed. 1955).

[6] *Ibid.*

[7] Cases cited note 2 *supra.*

[8] Various divisions of the cases are encountered in this field; the one employed here is adopted from 38 AM. JUR., *Negligence* §§ 221-24 (1941), and Annot., 92 A.L.R. 47 (1934).

III. The peril of the plaintiff *is not* actually discovered by the defendant, but should have been; the plaintiff is physically *unable* to prevent his injury through the exercise of due care.

IV. The peril of the plaintiff *is not* actually discovered by the defendant, but should have been; the plaintiff is physically *able* to prevent his injury through the exercise of due care.[9]

Category I. In this situation, the plaintiff typically has negligently placed himself in a perilous position, such as on a railroad trestle, from which he cannot escape through the exercise of due care and the means at his disposal. The defendant, who is also guilty of some prior negligence, has discovered the apparent peril of the plaintiff, but negligently fails to take any action to avoid injury to him. The defendant runs over the plaintiff, and injures him.

Prior to the defendant's discovery of the plaintiff's perilous situation, both parties had been guilty of negligence; however, after the defendant's discovery of the plaintiff's peril, the plaintiff did nothing further to contribute to his injury, but was simply powerless to avoid it. The defendant, on the other hand, still had a chance—that is, the last clear chance—to avert the accident, but failed to do so, and for his negligence in this respect he is held liable.

The cases in this category seem to be sound in result and in reasoning, and to be in conformity with established views on proximate cause. North Carolina allows recovery in this situation,[10] and in so doing it is in accord with virtually all jurisdictions.[11]

Category II. Cases in this category usually arise under the following type of fact situation: The plaintiff is standing on the railroad track, obviously oblivious to his surroundings. The defendant is the engineer of an approaching train, and is guilty of some prior negligence; he sees the plaintiff, but negligently fails to take any action to avoid an accident. The defendant runs over the plaintiff and injures him.

In this situation, it is clear that both parties have been negligent; it is also clear that, despite their prior negligence, both parties could have

[9] In all of these hypothetical situations, it is assumed that the plaintiff's peril would be apparent to an ordinary, reasonable, prudent man, and that the defendant could, through the exercise of due care, and with the means then at his disposal, avert the accident at the time he discovers (or should discover) the plaintiff's peril. Such is the law in North Carolina. Irby v. Southern Ry., 246 N.C. 384, 98 S.E.2d 349 (1957) (last clear chance inapplicable; no evidence the defendant could have stopped after he should have discovered the peril of the plaintiff); Lemings v. Southern Ry., 211 N.C. 499, 191 S.E. 39 (1937) (last clear chance inapplicable; peril of the plaintiff was not apparent); cases cited note 2 *supra*. The preceding case is noted in 16 N.C.L. REV. 50 (1938) in relation to other cases dealing with persons who were hit by trains while sitting on the end of a cross-tie. The principal difficulty in these cases seems to be the apparency of the peril of such a person.

[10] Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939).

[11] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

avoided the accident through the exercise of due care. Strictly speaking, it may well be that as a matter of actual fact in a case such as the example above, the plaintiff would have the "last clear chance"; that is, it might have been possible for the plaintiff to have avoided the accident even after it was no longer possible for the defendant to do so. For this reason, some question is frequently raised as to whether it is consistent with established theories of proximate cause to hold the defendant liable in this situation.[12] It would seem, however, that the plaintiff's actions in putting himself in a position of danger were a remote or incidental cause of the accident, and that the negligence of the defendant in not taking steps to avoid the accident after having perceived the situation was the efficient, substantial cause of the injury.[13]

The courts overwhelmingly hold the defendant liable in these cases,[14] albeit, as observed by Prosser,[15] frequently without stopping to inquire as to the consistency of so doing with established theories of proximate cause. North Carolina allows the plaintiff to recover in this situation in accord with the majority view.[16]

Category III. A fact situation which is typical of this category of cases is one where the plaintiff is unconscious on the railroad track; the

[12] Prosser, for instance, says that holding the defendant liable in this situation on the theory of proximate cause is a mere "fiction." PROSSER, TORTS § 52 (2d ed. 1955). Continuing, he says, "In such a case, the negligence of the plaintiff undoubtedly has been a cause, and a substantial and important one, of his own damage, and it cannot be said that injury through the defendant's negligence was not fully within the risk which the plaintiff has created." *Ibid.* Compare the same author on the subject of contributory negligence: "The accepted view now is that the plaintiff's failure to exercise reasonable care for his own safety does not bar his recovery unless his injury results from the particular risk to which his conduct has exposed him." *Id.* § 51. *Quaere* whether the risk that the driver of an approaching automobile will not take action to avoid injury to the plaintiff after he observes his obliviousness is within the risk created by one who crosses the street without looking.

[13] "The liability of defendant, under the doctrine of the last clear chance, did not depend upon the 'cessation or culmination of plaintiff's negligence.' What is meant by the quoted expression, which is used in the instruction, we suppose to be that plaintiff's negligence must have spent its force, or have become dormant or inactive. But this was not necessary to constitute the defendant's negligence the proximate cause of the injury. The very fact that the plaintiff, in the presence of danger, continued to be negligent, and in apparent ignorance of the danger with reference to the car, but increased the duty of the defendant's motorman to be on his guard and to adjust his conduct to that situation by lessening the speed of the car, bringing it under control and generally placing himself in a state of readiness to stop, should it be necessary to do so." Norman v. Charlotte Elec. Ry., 167 N.C. 533, 544, 83 S.E. 835, 840 (1914). Continuing, the court quotes from Ins. Co. v. Boon, 95 U.S. 117, 130 (1877): "'The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result.'" *Accord,* especially as to the special duty raised by knowledge of the situation, Terre Haute, I. & E. Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919).

[14] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

[15] PROSSER, TORTS § 52 (2d ed. 1955).

[16] Norman v. Charlotte Elec. Ry., 167 N.C. 533, 83 S.E. 835 (1914).

defendant engineer should have discovered the plaintiff in time to avoid injury to him, but did not. The plaintiff is run over by the defendant and injured.

In these cases the plaintiff has been negligent in allowing himself to get into such a position of peril, and the defendant has been negligent in failing to maintain a lookout;[17] thus when the defendant arrives on the scene both parties have been guilty of negligence. However, at this time the plaintiff's negligence has culminated, and has left him in a position of peril from which he cannot, through the exercise of due care, extricate himself in time to avert the injury. It is assumed, on the other hand, that there is a period of time during which the defendant could have averted the accident after he should, in the exercise of reasonable care, have discovered the plaintiff; and, therefore, it is reasoned that the defendant had the last clear chance to avoid the accident and should be held liable therefor. This view seems to be in accord with established doctrines of proximate cause, for it appears that the defendant's negligence in not availing himself of his opportunity to avoid injury to the plaintiff is really the efficient cause of the injury.

The North Carolina cases in this category have been uniform in allowing the plaintiff to recover under the doctrine of last clear chance.[18] In other jurisdictions, however, there is a wide diversity in the language of the cases, and some diversity in the holdings.[19] Prosser says the

[17] "The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track, and if by reason of his omission to look out for cows, horses and hogs he fails to see a drunken man or a reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of duty . . . . We are of the opinion that, when by the exercise of ordinary care an engineer can see that a human being is lying apparently helpless from any cause on the track in front of his engine, in time to stop the train by the use of the appliances at his command and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty." Pickett v. Wilmington & W. R.R., 117 N.C. 616, 636-37, 23 S.E. 264, 267 (1895). The duty of the driver of an automobile is laid down in Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 400, 11 S.E.2d 326, 332 (1940): "It is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway."

[18] Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954); Sawyer v. Roanoke R.R. & Lumber Co., 145 N.C. 24, 58 S.E. 598 (1907); Bogan v. Carolina Cent. R.R., 129 N.C. 154, 39 S.E. 808 (1901); Pickett v. Wilmington & W. R.R., 117 N.C. 616, 23 S.E. 264 (1895); Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890).

[19] For an example of a case allowing recovery in this situation, see Porto Rico Ry. Light & Power Co. v. Miranda, 62 F.2d 479 (1st Cir. 1932), *cert. denied,* 289

North Carolina view is the "strong minority,"[20] while another authority[21] concludes that where the fact situation of this category is actually presented, the majority of the courts allows recovery under the doctrine of last clear chance.

Category IV. The following is a situation typical of the cases in this category: The plaintiff is standing on the railroad track, obviously oblivious to his surroundings. The defendant engineer approaches without maintaining a proper lookout, and, though he should in the exercise of reasonable care discover the plaintiff, he does not. The defendant runs over the plaintiff and injures him.

In this situation neither party has discovered the danger (though both are negligent in failing to do so), and either party could prevent the injury simply through the exercise of due care. Furthermore, it cannot be said that the plaintiff's negligence has culminated in this situation; it is still an active, continuing thing. Therefore, it cannot be said that the defendant's negligence is *the* proximate cause of the injury, either on the basis of time sequence,[22] or as *the* substantial causative factor. Accordingly, to hold the defendant liable in a case of this type amounts to a departure from the theory of proximate cause; it is an imposition of liability on the defendant for injuring a plaintiff whose peril he should have discovered in time to avoid the injury, regardless of the contributory negligence of the plaintiff.

North Carolina again allows recovery to the plaintiff in cases falling in this category.[23] This places North Carolina in what is considered the decided minority upon this set of facts.[24]

Thus, it appears that many courts do not allow the application of the doctrine of last clear chance unless the plaintiff is actually discovered, and the great majority of courts does not allow it if, in addition, the plaintiff is not helpless. North Carolina has allowed recovery in all cases where there is: (1) a person in apparent peril; (2) ability to avoid

U.S. 731 (1933). For an example of a case denying recovery in this situation, see Hayman v. Pennsylvania R.R., 77 Ohio App. 135, 62 N.E.2d 724 (1945).

[20] PROSSER, TORTS § 52 (2d ed. 1955).

[21] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

[22] As noted earlier under the second category, where the plaintiff is merely oblivious to the approach of a train, for example, experience tells us that the plaintiff actually has an opportunity to avoid the accident which is subsequent to the last opportunity of the defendant.

[23] Triplett v. Southern Ry., 205 N.C. 113, 170 S.E. 146 (1933); Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 163 S.E. 122 (1932); Ingle v. Asheville Power and Light Co., 172 N.C. 751, 90 S.E. 953 (1916); Lassiter v. Raleigh & G. R.R., 133 N.C. 244, 45 S.E. 570 (1903); Wheeler v. Gibbon, 126 N.C. 811, 36 S.E. 277 (1900).

[24] 38 AM. JUR., *Negligence* § 224 (1941); Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947). For an example of a case following the majority view, see Allnutt v. Missouri Pac. R. Co., 8 F.2d 604 (8th Cir. 1925).

injury to the person after he should, in the exercise of reasonable care, have been discovered; and (3) a negligent breach of the duty to discover resulting in injury to the plaintiff.

The court held in the principal case of *Barnes v. Horney*[25] that judgment of nonsuit was proper because "the evidence in this case is insufficient to show the defendant had the opportunity to avoid the injury after he discovered, or should have discovered, the plaintiff's perilous position."[26] Looking at the facts again, it appears that the defendant did not discover the plaintiff until he was only twenty or twenty-five feet away, and that he did not recognize the true situation until he was only five or six feet away. It further appears that the defendant was traveling thirty miles per hour, and that he was able to stop his car within twenty-five feet after passing the plaintiff. Thus, even assuming that the defendant started braking his car when he first saw the object at a distance of twenty-five feet, he still was able to stop in a maximum of fifty feet.

Obviously, the defendant did not have time to avert the accident after he actually discovered and appreciated the plaintiff's peril. Quite as obviously, had he discovered and appreciated the peril before reaching a point fifty feet from the plaintiff he could have averted the accident. *Should the defendant, in the exercise of reasonable care, have discovered and appreciated the plaintiff's peril before reaching a point fifty feet from him?*

It is generally recognized in North Carolina that there is a duty to maintain a lookout while driving.[27] G.S. § 20-129(a)[28] and G.S. § 20-131(a)[29] provide that the driver of an automobile shall maintain his headlights so that he can see a person at least two hundred feet ahead. There was evidence that the point where the plaintiff was lying could be seen for two hundred feet. Conceding, *arguendo,* that it may not have been possible for the defendant to have seen the plaintiff in his prone position for two hundred feet, it would seem to have been at least a question for the jury whether or not the defendant should, in the exercise of reasonable care, have seen the plaintiff before reaching a point fifty feet from him.[30]

[25] 247 N.C. 495, 101 S.E.2d 315 (1957).
[26] *Id.* at 499, 101 S.E.2d at 317.
[27] See note 17 *supra.*
[28] N.C. GEN. STAT. § 20-129(a) (Supp. 1957).
[29] N.C. GEN. STAT. § 20-131(a) (Supp. 1957).
[30] "Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case, although there is no material conflict between the testimony of the witnesses examined, and, therefore, the jury should have been allowed to determine whether the engineer might have ascertained, by keeping a proper lookout, the real condition of the deceased, . . . and by timely exercise have saved him harmless . . . ." Deans v. Wilmington & W. R.R., 107 N.C. 686, 694, 12 S.E. 77, 80 (1890). See Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954), a case with facts almost identical with those of the principal case, where the court allowed recovery on the theory of last clear chance.

It appears that the facts of the principal case bring it clearly within Category III discussed above; *viz.*, the peril of the plaintiff was not actually discovered by the defendant, but should have been; the plaintiff was physically unable to prevent his injury through the exercise of due care. That being the case, both the weight of precedents and the sounder reasoning would seem to have required a reversal of the nonsuit which was granted below. The weight to be given to the contrary result, considering the court's orthodox statement of the rule,[31] must await further decisions.

LUKE R. CORBETT

Torts—Physicians and Surgeons—Liability for Signing a Certificate of Insanity Without Proper Examination of the Alleged Lunatic

In *Bailey v. McGill*[1] the North Carolina Supreme Court held that two physicians in signing certificates of insanity under G.S. § 122-43[2] were absolutely immune from civil liability to an alleged mentally disordered plaintiff.[3] The rationale of the court was that the defendant physicians were protected by the absolute privilege given to witnesses for statements made by them in a judicial proceeding.

The plaintiff alleged that the defendant physicians did not make an

[31] "Liability on the new act arises after the defendant has had sufficient opportunity, in the exercise of ordinary care, to discover and to appreciate the plaintiff's perilous position in time to avoid injuring him." 247 N.C. at 498, 101 S.E.2d at 317.

[1] 247 N.C. 286, 100 S.E.2d 860 (1957).

[2] N.C. GEN. STAT. § 122-43 (1952). This statute provides: "When an affidavit and request for examination of an alleged mentally disordered person has been made, . . . the clerk of the superior court . . . shall direct two physicians . . . to examine the alleged mentally disordered person . . . to determine if a state of mental disorder exists and if it warrants commitment to one of the State hospitals or institutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect . . . ."

The institution of the lunacy proceeding is provided for by N.C. GEN. STAT. § 122-42 (1952): "When it appears that a person is suffering from some mental disorder and is in need of observation or admission in a State hospital, some reliable person having knowledge of the facts shall make before the clerk of the superior court of the county in which alleged mentally disordered person is or resides, . . . an affidavit that the alleged mentally disordered person is in need of observation or admission in a hospital for the mentally disordered . . . ."

[3] The court held as to a third defendant physician that the plaintiff had stated a cause of action for abuse of process under N.C. GEN. STAT. § 122-42 (1952), because it was alleged that this physician through ill will and malice toward the plaintiff persuaded the plaintiff's parents to institute the lunacy proceeding and state that plaintiff was suffering from a mental disorder and was in need of observation and admission to a mental institution. However, on retrial of the issue in the Cleveland County Superior Court the case against this physician was dismissed after the close of plaintiff's evidence, evidently on the ground that the evidence was insufficient to go to the jury. It is not known whether an appeal was taken from this decision.